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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

71- 69

RICHARD SHERWOOD WEBSTER
and FRANK J. COLICCHIO, *Petitioners*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. _____

RICHARD SHERWOOD WEBSTER and
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vs.

UNITED STATES OF AMERICA, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

NOW COMES Petitioners, Richard Sherwood Webster and Frank J. Colicchio, by and through counsel, and pray this Honorable Court to issue writ of certiorari to review the judgment and order of the United States Court of Appeals for the Fourth Circuit, and in support hereof, respectfully show unto the Court the following:

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit PER CURIAM, in "United States v. Richard Sherwood Webster" and "United States v. Frank J. Colicchio" was filed June 14, 1971, and is reproduced in the appendix to this petition. (App. A, pp. 1a) Judgment was entered the same day. (App. A, pp. 1a) The opinion has not been officially reported as of the date of filing this petition.

Jurisdictional Grounds

The judgment here sought to be reviewed was entered by the Court of Appeals on June 14, 1971.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

1. Whether the evidence in this case is sufficient to show these petitioners were members of one continuous conspiracy or whether the evidence shows that if these petitioners are members of any conspiracy, they were members of a separate and limited conspiracy, not involved in the long continuing conspiracy to which certain of the co-defendants plead guilty?

2. Whether the petitioners' Constitutional rights to fair and impartial jury trial were violated by the trial court's failure to grant more than the ten pre-emptory challenges to be exercised jointly in the selection of the jury when there were four co-defendants consolidated for trial, over the objection of counsel for the petitioners?

3. Whether there was sufficient evidence to show the Petitioners entered into any agreement to violate any law and did any overt act in furtherance of any agreement or with knowledge the said automobiles were stolen?

Constitutional Provisions, Statutes Involved

United States Constitution, Article III, Section 2(3)
Rule 24(b) of the Federal Rules of Criminal Procedure
Title 18 United States Code, Section 371
Title 18 United States Code, Section 2311

Statement of the Case

This is a Petition to review by certiorari decision and judgment of the United States Court of Appeals for the

Fourth Circuit handed down June 14, 1971; the Court in a PER CURIAM opinion found no error and affirmed the Judgment entered by the Middle District Court of North Carolina.

The two Petitioners, Richard Sherwood Webster and Frank J. Colicchio were two of eight defendants who were indicted for conspiracy in violation of Title 18, United States Code, Section 371. In particular Webster and Colicchio were charged with doing some act in furtherance of a sale by the defendant Colicchio to a co-defendant Trivette of a 1967 Cadillac automobile in furtherance in a conspiracy to violate the Dyer Act. Following a mistrial in May, 1970, the defendants Colicchio and Webster were found guilty at a jury verdict at a second trial in October, 1970, from which verdict of guilty and sentence imposed by the District Judge of the Middle District of North Carolina, both defendants appealed to the United States Court of Appeals for the Fourth Circuit.

The facts giving rise to the issues presented for review are as follows:

Richard Sherwood Webster had been engaged in the wholesale automobile business in Winston-Salem, North Carolina, for many years, having purchased automobiles from the defendant Frank J. Colicchio and numerous other new and used car dealers in the New Jersey area for some 12 years or more.

Frank J. Colicchio had been engaged in the automobile business in the vicinity of Clark, New Jersey for approximately 16 years and four years of which he had been general manager of a new-car distributorship, in which he had a percentage ownership.

Webster had known the co-defendant Trivette for a period of several years and had sold him cars on numerous occasions for his personal use and for business use. The

evidence upon which the Petitioners were convicted was based on testimony of three alleged co-conspirators who plead guilty and testified for the Government. The evidence elicited by the Government concerning the two Petitioners in substance was to the effect that in the summer of 1967, Trivette, an alleged co-conspirator who plead guilty had for a period of several weeks been requesting Webster to find a late model Buick or other heavy car for him and his wife for their personal use. In the latter part of July, 1967, Trivette asked Webster if he had found a car for him. Webster then stated that he would seek the assistance of a dealer in the New Jersey area in helping him locate a car for Trivette. Webster placed a call to Colicchio from Trivette's office, during which telephone conversation nothing was mentioned about any stolen automobile. Trivette testified that Colicchio stated that he did not have an automobile at that time, but that he would try to locate an automobile for Trivette. Colicchio took Trivette's telephone number and agreed to call him if he located an automobile. Colicchio did locate an automobile owned or in the possession of Austin, an alleged co-conspirator who testified for the Government. Colicchio called Trivette and described a baby-blue Cadillac, which a customer of his had and determined that Trivette would be in Wilmington, North Carolina, the following week and that Trivette would be interested in buying the automobile. Austin did in fact deliver a baby-blue Cadillac to Trivette on August 10, 1967, in Wilmington, North Carolina, which automobile was reported stolen to the New York Police Department on the 9th day of August, 1967.

That thereafter, the defendant Trivette again sought from these Petitioners an additional automobile for his wife and a late model Cadillac was subsequently delivered to Trivette by Austin. Trivette testified that the low value

on both of these vehicles was because of the fact that these were leased automobiles and he did not believe the automobiles to be stolen at the time. That on the occasion when Austin was in Winston-Salem to deliver the second automobile, the defendants Austin and Trivette entered into an agreement whereby Austin was to supply Trivette with automobiles at good prices to be resold in North Carolina by the defendant Trivette. The defendant Trivette later engaged the co-defendant Temples to transfer titles and assist in disposing of said automobiles. The evidence is explicit that neither of the Petitioners were parties to the agreement and the Petitioner Colicchio had no further dealings with any of the parties, including Webster thereafter. The only evidence regarding Webster other than with regard to the first automobile above referred to was that he looked at and appraised the second automobile for Trivette and an inference that some part of the money paid to Webster in early summer of 1967, was applied by Webster toward the second automobile. The only other evidence linking Webster was any overt act or participation in any manner in the long series of automobiles stolen in New York by Austin and delivered to Winston-Salem to Trivette and Temples was the testimony of Trivette to the effect that on the first automobile delivered by Austin to Trivette pursuant to the agreement between Austin and Trivette, a red Cadillac convertible, was seen in the possession of the defendant Beamer in the presence of Webster on one occasion prior to Beamer purchasing the said automobile.

With the exception of the defendant Austin, all the defendants testified that they had no knowledge that the automobiles were stolen when and at any time during the period the first three automobiles were delivered and suspected and acquired such knowledge long after either

Colicchio and Webster had any dealings with any of the parties named as co-defendants. All of the direct evidence presented by the Government is to the effect that none of the co-defendants who plead guilty to the conspiracy ever entered into an agreement, either express or implied, with either of the Petitioners to engage in the buying, selling or otherwise dealing in stolen automobiles. All of the direct evidence from the Government's witnesses is to the effect that there was an express agreement entered into between Austin and Trivette and later joined by Temples with some inference that Renn and Beamer participating to some extent in buying, selling or otherwise dealing in the disposition of stolen automobiles and that any participation of either of the Petitioners occurred prior to and separate and apart from this agreement. The Petitioners would like to emphasize that all substitutive evidence regarding overt acts and participation by individuals involved was solely by the testimony of three alleged co-conspirators who plead guilty and who in fact did receive sentences lighter than the Petitioners even though their participation was in a larger scale and to a greater degree.

Reasons for Granting the Writ

I.

This case raises important questions involving substantial rights of the Petitioners. The Petitioners respectfully contend that the United States Court of Appeals for the Fourth Circuit has not in this case reached a decision compatible to the decisions of other circuits as it applies to the interpretation and definition of one continuous conspiracy as contrasted to separate and distinctly different conspiracies. The Petitioners respectfully contend first and foremost that any overt act or participation by them was prior to and separate and apart from the agreement,

entered into by and between Austin and Trivette on or about November 6, 1967, and later joined by others. Secondly, even if there is sufficient evidence to convict either of the petitioners of conspiracy to violate the Dyer Act, then in such event this was a separate and distinct conspiracy which terminated at or prior to the time Austin and Trivette entered into the agreement to begin dealing in automobiles. In this regard the Petitioners wish to emphasize all the evidence is to the effect these Petitioners' sole action was to acquire personal automobiles for Trivette for his and his wife's own use, and was never concerned with buying and selling automobiles with Trivette or any of the other defendants. Austin testified that the two agreements were for different objects, were with different persons, and totally unrelated to the other.

The Trial Court erred in treating events and automobiles involved prior to November 6, 1967, as one and the same continuing conspiracy.

In *Kotteakos v. U.S. 328 U.S. 750, 66 S.Ct. 1239, 90 L. Ed 1557 (1946)*, the Government: "Admitted that the evidence proved eight or more separate conspiracies to violate the National Housing Act (12 U.S.C. Sections 1702, 1703, 1715, 1731), rather than the one conspiracy charged. Although one defendant, Brown, was "the common and key figure in all the transactions proven", there were "at least eight, and perhaps more, separate and independent groups, (including 32 persons), none of which had any connection with any other, though all dealt independently with Brown as their agent'." 328 U.S. at 753, 66 S.Ct. at 1243. The Court in holding that the joining as one conspiracy the number of different conspiracies actually proven was not harmless error under Section 269 of the Judicial Code (28 U.S.C. Section 390), stated that '[t]he dangers of transference of guilt from one to another across

the line separating conspiracies, subconsciously or otherwise are so great that no one can really say prejudice to substantial right has not taken place." 328 U.S. at 774, 66 S.Ct. at 1252."

In *Barnard v. U.S.* 342 F. 2d 309 (9th Cir. 1965) "the indictment charged 28 defendants with conspiring to defraud various insurance companies by staging five automobile accidents and claiming damages for personal injuries in connection therewith. The Court of Appeals found that 22 defendants were connected with only one collision, three were connected with two collisions, and one was connected with three collisions. Only the defendant Barnard was involved in, and in fact planned all five accidents. The Court reversed the convictions, stating that each accident was planned separately and that no evidence was presented which showed that the planning of each accident contemplated more than that particular one."

But the leading case and almost exactly like the present case is *United States v. Varelli*, 407 F. 2d 735 (7th Cir. 1969), where the Court reversed convictions for conspiring to commit various truck hijacking offenses. The Court held that "while the hijackings were sufficiently related to allow all the defendants to be tried together, there was not sufficient evidence from which it could be concluded that there was one overall conspiracy." As in *Kotteakos*, the instructions permitted the jury to "transfer guilt from one to another and to find defendants guilty of an overall conspiracy although they were only related to [one] hijacking" 407 F. 2d at 747.

> In *United States v. Varelli, supra*, the Court stated: "The distinction must be made between separate conspiracies, where certain parties are common to all and one overall continuing conspiracy with various parties joining and terminating their relationship at different

times. Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy. While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with these core conspirators and others to achieve a common goal may be members of an overall conspiracy. In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy. However, where various defendants separately conspired with a common conspirator to obtain fraudulent loans from an agency of the United States, the government conceded that there were several conspiracies since there was no overall goal or common purpose."

* * *

"We agree with the conclusion in *Aviles* that a single act performed with parties who are involved in more than one conspiracy may be insufficient to draw an inference of the existence of an agreement between the parties in the case of multiple conspiracies. Knowledge of the existence of the other parties to the conspiracy is insufficient. While the crime of conspiracy is completed as soon as the unlawful agreement is formed, *United States v. Kissel, 218 U.S. 601, 607, 31 St.Court, 124. 54 L.Ed. 1168 (1910)*, it must be shown that this agreement was made prior to or during the consummation of the single act."

* * *

"While some of the parties who took part in the Polaroid hijacking were also involved in the silver hijackings, this alone is insufficient to support a finding

> of one overall continuous conspiracy. The conspirators in the Polaroid hijacking did not contemplate a series of hijackings in which all would partake. Rather, the Polaroid hijacking represented a single transaction with a single purpose. The fact that the object in both the Polaroid hijacking and the silver hijackings were similar is insufficient to constitute an overall common conspiracy. *Blumenthal v. United States*, 332 *U.S. 539, 68 S Ct. 248 (1947)*. Therefore, we conclude that there was insufficient evidence from which the jury could find a single overall conspiracy."

* * *

These Petitioners further contend that any act done by them which the evidence might tend to show was done without any general plan or scheme and done prior to the beginning of the conspiracy. In *Kotteakos vs. U.S., supra, 328 U.S. 750, 771*, the Court stated it was possible "(N)ot only for the jury to find that all the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also, for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some." In U.S. vs. Varelli, supra, at page 747, the Court held: "Here, while the hijackings were sufficiently related to allow all the defendants to be tried together, there was not sufficient evidence from which it could be concluded that there was one overall conspiracy. The jury was not properly instructed in order that they could find multiple conspiracies and still find the defendants guilty. Without being properly instructed, it was possible for the jury to transfer guilt from one to another

> and to find defendants guilty of an overall conspiracy although they were only related to the Polaroid hijacking. We find it necessary to void the convictions of the defendants because their rights were substantially prejudiced by a single trial without proper instructions."

These Petitioners therefore respectfully contend that even if they were involved with Austin and Trivette in one agreement, they certainly were not involved in the other agreement, and therefore, should not have been charged and tried with all the other defendants, where the jury could from piling inference upon inference, convict these Petitioners as being parties to a long, large, multi-party conspiracy over a relatively long period of time. Such a result is clearly in conflict with the holdings of the Courts of other circuits hereinabove recited.

II.

Another important question of Federal Law concerns the Constitutional rights of the Petitioners under the United States Constitution, Article 3, Section 2(3) to a fair and impartial trial which includes the selection of a fair and impartial jury. Conceding that the Courts have held that the matter of preemptory challenges is a procedural question, it is respectfully submitted that additional guide lines to the Federal Rules are needed. This case is a clear example of why.

Rule 24(b) of Federal Rules of Criminal Procedure in part provides: "... If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges.... If there is more than one defendant, the Court may allow the

defendants additional peremptory challenges and permit them to be exercised separately or jointly."

This is a discretionary matter with the Trial Judge and proving abuse of discretion is almost impossible.

The Trial Court in this case stated: "I usually ask the defendants if they are satisfied with the jury. You have put me in a position that I can't ask you that, because, I guess, you are not satisfied with them." Quite obviously the Petitioners were not satisfied. There were four co-defendants on trial and the Petitioners' positions were contrary to the other co-defendants – yet all four had to exercise their preemptory challenges jointly and it was difficult to agree on the challenges. So, in effect, the Petitioners were only allowed 2 and one-half challenges, which clearly shows a failure on the part of the Court to allow the Petitioners to be satisfied in the selection of a fair and impartial jury in violation of the United States Constitution, Article 3, Section 2(3).

Kerr (U S D J D Wyo.) Empaneling of a Jury, in Seminar on Practice and Procedure (CA 10th, 1960) 28 FRD 37, 185, 188: "I have never adhered too strictly to the rules if for any reason counsel feels after exhausting his challenges that he had objection to one or more jurors." Judge Kerr then concluded that this allows the judge to obtain a statement of counsel on the record that he is satisfied with the jury. It is submitted that Judge Kerr's position is more fair and reasonable and Rule 24(b) of the Federal Rules of Criminal Procedures needs to be enlarged to so reflect this view.

III.

Thirdly, the Petitioners contend the United States Court of Appeals for the Fourth Circuit erred in failing to find error in the Trial Court's finding sufficient evidence to sub-

mit to the jury against these Petitioners. All the evidence is to the effect no agreement, express or implied, was entered into between either of the Petitioners and the alleged co-conspirators to engage or participate in dealing in stolen automobiles. The evidence is further to the effect that knowledge that the automobiles were stolen at the time of any participation by these petitioners, was known only to Austin who had no agreement or conversations with Webster at all and who expressly excludes Colicchio from any participation after entering into his agreement to engage in a series of transactions with the defendant Trivette. Without proof of an agreement and knowledge that the automobiles were stolen, there is no evidence to submit the Petitioners' case to the jury.

Theory of Petitioners' defense at the trial below was that while they might be guilty of a substantive crime under 18 USC 2313, they are not guilty of a conspiracy with co-defendants Temples, Trivette, Beamer, Austin and Renn. The Court below charged the jury that there are four essential elements that the government is required to prove beyond a reasonable doubt to convict the defendant of conspiracy, namely: (1) that the conspiracy was knowingly and wilfully formed and was existing at or about the time alleged; (2) that the defendant wilfully and knowingly became a member; (3) that one of the conspirators thereafter knowingly and wilfully committed an overt act; and (4) that such overt act was knowingly and wilfully done in furtherance of the object or purpose of the conspiracy charged.

In *United States vs. Falcone, 311 US 205, 61 S.Ct. 204, 85 L Ed 128 (1940),* the Court said:

> "The gist of the offence of conspiracy . . . is agreement among the conspirators to commit an offense attended

by an act of one or more of the conspirators to effect the object of the conspiracy."

And the Court went on to say that one who sells is not guilty of conspiracy, even if the sale furthered the objective of the conspiracy provided the seller had no knowledge that a conspiracy existed. Petitioners respectfully submit that, basically, the evidence in this case tends to show that the defendant Trivette wanted to buy a car at a cheap price; that Trivette, through Webster, a used car dealer, contacted Colicchio, a car dealer in New Jersey, for the purpose of purchasing a cheap car. Trivette talked with Colicchio by telephone in early August, 1967, about getting a Cadillac for $2,700.00 and was told the car was available at the time the telephone conversation took place. Some week or two weeks later, the car was delivered by Austin to Trivette in North Carolina. Testimony further is that Trivette did not know the car was stolen and, in fact, thought it was a leased car. Sometime later, a second car was caused to be delivered to Trivette by Austin. These are the only two overt acts in which Colicchio was in any way connected. Austin's part at this stage of the transaction was to see that the two cars were delivered and money was paid for them; and he was paid for making these deliveries. Webster got nothing out of the deal. The evidence further is that Trivette bought these two cars for his own personal use.

The co-defendants who pleaded guilty and testified in behalf of the government; namely, Austin, Temples and Trivette, all testified that there was an agreement among the three of them to deal in stolen automobiles. There was no evidence on the part of the government that the Petitioners had knowledge and an intent to become involved in a plan or scheme to deal in stolen automobiles. It is submitted that the government has fallen short of

proving that the Petitioners joined in any agreement to deal in stolen automobiles.

In *United States vs. Borelli, 336 F 2d 376 (2d Cir. 1964),* the Court said:

> "Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant."

The evidence is that Colicchio had a hand in selling two automobiles and they were the first two automobiles delivered to North Carolina, and those automobiles were for the personal use of Trivette and for no other purpose. The evidence further discloses that Webster's sole connection was to contact Colicchio for the defendant Trivette and appraise and inspect one of the cars for Trivette. The evidence therefore falls short of showing an agreement on the part of the Petitioners to join in a conspiracy to deal in stolen automobiles. The evidence viewed in the light most favorable to the government is that Colicchio sold a stolen automobile to Trivette at a time when neither Webster nor Trivette knew it was stolen; therefore, there could be no agreement between Colicchio, Webster and Trivette to deal in stolen cars.

In *United States vs. Kane, 351 F 2d 600 (2d Cir. 1965)* the Court said:

> "It is true that where a defendant is charged with participating in one central conspiracy involving many transactions, evidence of mere participation in a single transaction will not ordinarily justify conviction for conspiracy unless the defendant knew that the single transaction was in execution of the larger venture which made up the conspiracy."

Clearly, whether it be one or two single transactions, a mere sale of an automobile by Colicchio to Trivette, with assistance of Webster, without more, does not warrant the matter's being submitted to the jury, and defendants' motion should be allowed at the end of all the evidence.

In the case of *Ingram vs. United States 360 U.S. 672, 70 S.Ct. 1314, 3L Ed 2d 1503 (1959)*, the Supreme Court said:

> "Without the knowledge, the intent cannot exist. ... Furthermore, to establish the intent, the evidence of knowledge must be clear no equivocable... This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning ... a dragnet to draw in all substantive crimes."

Petitioners contend that the only basis for their conviction is not on substantive evidence but upon inference and insinuations, neither of which are sufficient at law to sustain a conviction.

Conclusion

IT IS RESPECTFULLY SUBMITTED that this Court should grant Certiorari for it presents an opportunity to set up *guide posts* in two important aspects of the Criminal Law.

One, decisions of the various Circuits present some conflict on the question of one continuing conspiracy as opposed to separate conspiracies. The protection of individual rights from conviction on conspiracy charges from insinuations and innuendos, needs clearer *guide lines* to govern the lower Federal Courts.

Two, guide lines for *preemptory* challenges are urgently needed for the lower Federal Courts so that individuals have some protection to insure fair and impartial jury selections when more than one defendant is being tried.

It is Therefore Respectfully Submitted that this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

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Filed June 14, 1971 – Samuel W. Phillips, Clerk

APPENDIX A — Opinion

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 71-1096

UNITED STATES OF AMERICA, *Appellee,*

vs.

RICHARD SHERWOOD WEBSTER, *Appellant*

No. 71-1097

UNITED STATES OF AMERICA, *Appellee,*

vs.

FRANK J. COLICCHIO, *Appellant*

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro, Eugene A. Gordon, District Judge.

(Argued June 8, 1971 Decided June 14, 1971)

Before BOREMAN, BUTZNER and RUSSELL, Circuit Judges.

OPINION BELOW

Leslie G. Frye for appellant in No. 71-1096; Richard G. Badgett (Badgett and Calaway on brief) for appellant in No. 71-1097; William L. Osteen, United States Attorney (Bradley J. Cameron, Assistant United States Attorney, on brief) for appellee.

PER CURIAM:

Upon consideration of the record, the brief filed on behalf of each appellant, the oral arguments presented by counsel for each individual appellant, the brief of the United States and the argument of the United States Attorney in these consolidated appeals, we find no error and affirm the judgments below.

Affirmed.

APPENDIX B — Constitution and Statutes Involved:

United States Constitution, art. III, Sec. 3:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place of Places as the Congress may by Law have directed."

Federal Rules of Criminal Procedure, Rule 24(b):

> "If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. . . . If there is more than one defendant, the Court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly."

18 U S C 37, Conspiracy to commit offense or to defraud United States:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years or both."

18 USC 2313, Sale or receipt of stolen vehicles:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD SHERWOOD WHEETER and
FRANK J. CORSCHEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD
Solicitor General
Department of Justice
Washington, D. C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-69

RICHARD SHERWOOD WEBSTER and
FRANK J. COLICCHIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of North Carolina, petitioners were convicted of conspiracy to transport, receive, conceal and sell stolen motor vehicles in violation of 18 U.S.C. 371. Petitioner Webster was sentenced to thirty-six months' imprisonment and petitioner Colicchio to fifty-four months' imprisonment, both subject to the parole provisions of 18 U.S.C.

4208(a)(2). The court of appeals affirmed *per curiam*:

The evidence showed that petitioner Colicchio was an independent salesman and dealer in new and used cars in New Jersey. He had been associated with a new car dealership for twelve years prior to May, 1967, the last two years as general manager and stockholder (Tr. 559-560).[1] During this time, Colicchio frequently sold used cars to dealers in the South. One of these dealers was petitioner Webster, who was a used car wholesaler in North Carolina (Tr. 310, 565-566).

Co-conspirator, Trivette, a professional photographer, had dealt with Webster in automobiles for about four or five years. In March 1967 Trivette had purchased through Webster a 1965 Chevrolet without a title subsequently found to have been stolen. Trivette sold the car after driving it for several months. In the early summer of 1967 Webster informed Trivette that he could get a good deal on almost new leased cars from a friend up North (Tr. 383-386, 393-395). Trivette expressed interest in the deal but nothing further developed until August 1967 when Webster came to Trivette's office and telephoned petitioner Colicchio in New Jersey. Colicchio told Trivette that he had a blue Cadillac Eldorado ready to go and could have it down in a few days (Tr. 387).

Colicchio contacted co-conspirator Austin and asked Austin to deliver a stolen 1967 Cadillac to a man in

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[1] "Tr." refers to the trial transcript, a copy of which is being lodged with the Clerk.

North Carolina subsequently identified as Trivette. Colicchio wanted Austin to pick up the money for him because he did not trust the men who were stealing the cars (Tr. 111-112).

A few days later in September or October 1967, Austin went to Wilmington, North Carolina and met the man who had driven the stolen Cadillac down. Before the car was delivered, Colicchio told Trivette by telephone not to talk to the men delivering the car, but just to go ahead and get the title for it. Austin and the other man then delivered the car to Trivette (Tr. 113, 127, 387-388). Trivette gave Austin $2500 for the car and $200 for travel expenses. The men gave Trivette a New York registration certificate for the car and a bill of sale, which Austin had signed with a fictitious name showing a sale price of $6500 (Tr. 113-117, 388-389). The following evening, Austin delivered the money, less his $500 cut, to Colicchio in New Jersey (Tr. 118).

Trivette had asked Webster to arrange for a Buick Electra for Trivette's wife, and had given Webster a $1600 down payment on the price of $2500. About a week after the delivery of the first Cadillac, Colicchio telephoned Trivette and told him that the Buick had been sent the wrong way and agreed to send a Cadillac for the same price (Tr. 390). Colicchio again contacted Austin to pick up and deliver the Cadillac as a replacement car to "his man Dick" (Webster) in North Carolina (Tr. 119, 172, 390). Austin contacted Trivette on his arrival in North Carolina the following Sunday and subsequently Trivette went to pick up the car, a 1967 Cadillac four door, accom-

panied by Webster. Webster told Trivette that Colicchio had said that the money was to be paid to Webster rather than the men delivering the car. Trivette paid Webster the balance of the $2500 price and gave Austin a couple of hundred dollars for transportation (Tr. 120-122, 391). Trivette's wife drove this car for several months and it was then sold through co-conspirator Beamer to one Morris. The title application and bill of sale for the car were filled out by co-conspirator Temples who inserted a price of $4850 based on the retail value of the car (Tr. 220-229).

After the second car had been delivered, Austin suggested to Trivette that he could supply Trivette with cars from the same source for less money and suggested cutting out Colicchio. Trivette agreed and thereafter Austin dealt directly with the people in New York who stole the cars and no more cars came through Colicchio (Tr. 121-125, 168-171, 398).

Another 1967 Cadillac convertible was delivered to Trivette's house around September 1967 and sold to co-conspirator Beamer. Webster had Trivette send a man over to sign a fictitious name to the bill of sale (Tr. 392-393, 475-476). Beamer had the title application prepared by co-consiprator Temples for $300 (Tr. 214-219).

Subsequent to the conversation about cutting out Colicchio, more than ten other stolen cars were delivered from the New York area by Austin and others to Trivette and Temples (Tr. 56-82, 104-107, 126-140, 175). At Webster's suggestion, Trivette arranged to have Temples fill out the paperwork on most of these

cars, inserting prices in the applications and bills of sale based on the retail value, although the actual prices were often several thousand dollars below retail (Tr. 220-255, 399). The cars were sold in North Carolina through a group of co-conspirators including Trivette, Temples, Beamer and Renn. This activity continued until about May 1968 when the FBI investigation began.

1. Petitioners contend that the evidence was not sufficient to show an agreement on their part to engage in the transportation and sale of stolen automobiles, and that if an agreement did exist, it pertained only to two cars and was not part of the overall, continuous conspiracy. The sufficiency of the evidence to establish the existence of an agreement was, however, a question of fact decided against petitioners by the jury on proper instructions, and there is no reason to disturb that finding. The scope of the conspiracy must have been known by petitioners even though the number or identities of all the other conspirators may not have been known. The jury was repeatedly instructed that an agreement was the gist of the offense.

The existence of a single conspiracy or multiple conspiracies is a fact question for the jury, on proper instructions, based on the nature of the agreement. *United States* v. *Varelli*, 407 F.2d 735, 746 (C.A. 7); *United States* v. *Crosby*, 294 F. 2d 928, 945 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984. Here, the jury was instructed that "proof showing different and disconnected smaller conspiracies will not sustain a conviction" (Tr. 748). Petitioners requested no instruc-

tion on separate conspiracies and there were no objections to the trial judge's charge.

From the evidence, the jury could find one continuous conspiracy (in which some parties had larger parts than others) to transport and sell stolen automobiles. *Blumenthal* v. *United States*, 332 U.S. 539, 558-559; *United States* v. *Nasse*, 432 F. 2d 1293 (C.A. 7), certiorari denied, 401 U.S. 938.

2. Petitioners' contention that they were denied a fair trial because they were limited to the joint exercise of ten peremptory challenges is without substance. There is no suggestion in the record, and no showing by petitioners, that the jury was not fair and impartial. This is the limit established by Rule 24(b), F.R.Crim.P., and the exercise of the court's discretion in refusing to grant additional peremptory challenges was proper. *United States* v. *Crutcher*, 405 F. 2d 239, 245 (C.A. 2), certiorari denied, 394 U.S. 908.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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